

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MICHAEL BURNHART, AKA (KELLY),

Plaintiff,

v.

HAROLD W. CLARK, *et al*,

Defendants.

Case No. C06-5326RJB-KLS

ORDER TO SHOW CAUSE

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Magistrates Rules MJR 3 and 4, and Rule 72 of the Federal Rules of Civil Procedure. The case is before the Court upon the Court's review of the complaint. After reviewing the complaint and the balance of the record, the Court finds and orders as follows:

A complaint is frivolous when it has no arguable basis in law or fact. Franklin v. Murphy, 745 F.2d 1221, 1228 (9<sup>th</sup> Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a complete

1 defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before service of  
2 process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 1448 (9<sup>th</sup> Cir. 1987) (*citing* Franklin  
3 v. Murphy, 745 F.2d 1221, 1227 (9<sup>th</sup> Cir. 1984)).

4 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (i) the conduct complained of  
5 was committed by a person acting under color of state law and (ii) the conduct deprived a person of a  
6 right, privilege, or immunity secured by the Constitution or laws of the United States. Parratt v. Taylor,  
7 451 U.S. 527, 535 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986). Section  
8 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present.  
9 Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985).

10 Plaintiff also must allege facts showing how individually named defendants caused or personally  
11 participated in causing the harm alleged in the complaint. Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir.  
12 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory  
13 responsibility or position. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 n.58  
14 (1978). A theory of *respondeat superior* is not sufficient to state a section 1983 claim. Padway v.  
15 Palches, 665 F.2d 965, 968 (9th Cir. 1982).

16 Plaintiff names as defendants in his complaint, Harold W. Clark, the Secretary of the Washington  
17 State Department of Corrections (“DOC”), and James Thatcher, the “director” of DOC. In his complaint,  
18 plaintiff sets forth certain issues he has with the use of polygraph testing by DOC in general, and with  
19 respect to his sentencing in particular. Plaintiff, however, has failed to set forth any facts showing how the  
20 individual defendants named in his complaint participated or personally participated in the harm alleged.  
21 Indeed, it is not clear from the complaint what exactly the harm is plaintiff is alleging, let alone that he is  
22 alleging a violation of federal law or his constitutional rights. To the extent plaintiff is naming defendants  
23 Clark and Thatcher because they are the persons who are ultimately responsible for DOC’s policies and/or  
24 the actions of its officials, as noted above, liability under section 1983 is unavailable on the basis of  
25 supervisory responsibility or position.

26 Finally, plaintiff appears to be seeking injunctive and/or declaratory relief concerning the use of  
27 polygraph testing by DOC, and DOC’s policies and authority with respect thereto. However, under the  
28 Eleventh Amendment to the United States Constitution, a state is not subject to suit by its own citizens in  
federal court. Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). A state agency, as an arm of the state, is

1 immune from suit in federal court under the Eleventh Amendment as well. Howlett v. Rose, 496 U.S. 356,  
2 365 (1990); Will v. Michigan Dep't of State Police, 491 U.S. 58, 70 (1989). An entity that has Eleventh  
3 Amendment immunity also is not a "person" within the meaning of 42 U.S.C. § 1983.<sup>1</sup> Howlett, 496 U.S.  
4 at 365. Because DOC is a state agency, it is immune from liability here.

5 In addition, "[i]t is elementary that one is not bound by a judgment in personam resulting from  
6 litigation in which he is not designated as a party or to which he has not been made a party by service of  
7 process." Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969). In other words, "a court has  
8 no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the  
9 defendant." Id. Here, plaintiff has not named DOC as a defendant in this case. As such, the Court has no  
10 power to grant plaintiff the relief he requests to the extent that relief concerns injunctive or declaratory  
11 relief with respect to DOC. Even if the Court did have such power, however, again, as just discussed,  
12 DOC possesses Eleventh Amendment immunity here.

13 Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff shall file  
14 an amended complaint, curing, if possible, the above noted deficiencies, or show cause explaining why this  
15 matter should not be dismissed by **no later than September 10, 2006**. The amended complaint must carry  
16 the same case number as this one. If an amended complaint is not timely filed or if plaintiff fails to  
17 adequately address these issues, the Court will recommend dismissal of this action as frivolous pursuant to  
18 28 U.S.C. § 1915, and such dismissal will count as a "strike" under 28 U.S.C. § 1915(g).

19 Plaintiff is advised that an amended pleading operates as a *complete* substitute for an original  
20 pleading. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9<sup>th</sup> Cir. 1992) (citing Hal Roach Studios, Inc. v.  
21 Richard Feiner & Co., 896 F.2d 1542, 1546 (9<sup>th</sup> Cir. 1990) (as amended), *cert. denied*, 506 U.S. 915  
22 (1992). Thus, if plaintiff chooses to file an amended complaint, the Court will not consider his original  
23 complaint.

24 The Clerk is directed to send plaintiff the appropriate forms so that he may file an amended  
25 complaint. The Clerk is further directed to send a copy of this Order and a copy of the General Order to  
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27 <sup>1</sup>Section 1983 reads in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or  
28 usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States  
or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the  
Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for  
redress." 42 U.S.C. § 1983.

1 plaintiff.

2 DATED this 10th day of August, 2006.

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6 Karen L. Strombom  
7 United States Magistrate Judge  
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